

MHST160033442018



Order below Exh.38 in RCS No. 215/2018

**Sachin Janardan Patne Vs Dattraya
Sakharam Raskar**

(Passed on 18.08.2023)

This is an application filed by plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure 1908. The plaintiffs filed this suit for perpetual injunction not to construct over suit property and mandatory injunction.

2. Through this application plaintiff prayed for appointment of commissioner for measurement of the property having C.S.no.378 and C.S.no.377, describing in para 1 of plaint situated at mouje Bavdhan, Tal-Wai. It is the contention of plaintiff that he did not file this suit for removal of encroachment. He filed this suit for mandatory injunction that the tiles which he fitted over lane towards east side of C.S.no.378, are removed by defendant.

3. Plaintiff further submitted that the lane is towards east side of C.S.no.378. C.S.no.377 of defendant is towards east side of said lane. Hence, it would proper to measure both C.S.nos. 377 and 378. After measurement, it will come on record the situation towards east side of C.S.no.378. Hence, he prayed for joint measurement of both C.S.No.377 and 378.

4. Per contra defendant in his say at Exh. 39, opposed the said application. He contended that the said prayer of the plaintiff is wrong and illegal. There is no need to appointment of commissioner.

5. Defendant further submitted that the suit is instituted in the year 2018. He filed written statement at Exh.21 and denied the suit. Therefore, till 2023, plaintiff has not filed such type of application. He filed this application after 5 years of the suit. Similarly, the suit is at the stage of hearing. The cross-examination of plaintiff is partly done. The plaintiff is prolonging the matter by filing such type of applications. Plaintiff cannot appoint Court-commissioner by the help of Court. Hence, the application be rejected.

6. Following points arise for my determination. My findings on each of them with reasons are as follows:

Sr. No.	Points		Findings
1.	Whether plaintiff is entitled for relief of appointment of Court Commissioner under Order XXVI ... Rule 9 Of Code of Civil Procedure 1908 ?	...	No.
2.	What order?	...	As per final order.

7. I heard the Ld. Advocate of the plaintiff and Ld. Advocate of the defendant. Perused the record of the case.

8. Ld. Advocate of plaintiff submitted that the lane is towards east side of C.S.no.378. C.S.no.377 of defendant is towards east side of said lane. Hence, it would proper to measure both C.S.nos. 377 and 378. After measurement, it will come on record the situation towards east side of C.S.no.378. Hence, he prayed for joint measurement of both C.S.No.377 and 378.

9. Per contra Ld. Advocate of defendant submitted that the suit is instituted in the year 2018. Defendant filed written statement at Exh.21 and denied the suit. Therefore, till 2023, plaintiff has not filed such type of application. He filed this application after 5 years of the suit. Similarly, the suit is at the stage of hearing. The cross-examination of plaintiff is partly done. The plaintiff is prolonging the matter by filing such type of applications. Plaintiff cannot appoint Court-commissioner by the help of Court. Hence, the application be rejected.

10. It is seen that Order 26 Rule 9 of the Code of Civil Procedure 1908 provides that in any suit in which the court deems a local investigation to be requisite or proper of elucidating any matter in dispute the court may issue a commission to such person as it thinks fit.

11. In order to support, the plaintiff has relied upon following authorities: ***Kashinath V/s Haribhau, 2004(2) Mh.L.J.722.*** 2) ***Tajmulhussain Mulla V/s Satish Chavhan, 1994 Mh.L.J. 664.*** 3) ***Manikrao V/s Ashok, 2014 (2) Mh.L.J.840.*** 4) ***Kashinath Chopade Vs. Purushottam takade, 2005(4)Mh.L.J. 471.*** 5) ***Ramzan Sheikh V/s. Punjab, 2014 (6) Mh.L.J.97.*** 6) ***Meenadevi V/s. Narmadabai, 2015 (6) Mh.L.J.578.***

12. I have gone through these authorities. Hon'ble Court observed that, appointment of Court commissioner is appearing to be essential in matter.

13. But this is the suit for perpetual injunction that not to construct over suit property and mandatory injunction. Similarly, it is taking into consideration that plaintiff claiming relief of appointment of Court commissioner. The suit is at the stage of hearing. The cross-examination of

plaintiff is partly done. The submission of Ld. Advocate of plaintiff that it will come on record the situation towards east side of C.S.no.378 upon joint measurement of both C.S.No.377 and 378. But it cannot be elucidated by appointing Court commission. Hence, I pass following order:

ORDER

The application is rejected.

Date-18.08.2023
Place-Wai

(Smruti S. Kulkarni)
4th Jt. Civil Judge Jr.Dn.Wai.